Editor's note: Appealed -- dismissed, Civ.No. 86-88-Bu (D.Mont. Oct. 27, 1987)

UNITED STATES
v.
LESTER MILLER AND
ARLENE M. MILLER

IBLA 84-438 Decided April 8, 1986

Appeal from a decision by Administrative Law Judge Michael L. Morehouse declaring the Montreal Star #1 and Montreal Star #2 lode mining claims to be invalid. M 056294.

Affirmed.

1. Administrative Authority: Estoppel--Estoppel--Mining Claims: Lands Subject to--Mining Claims: Location

   The fact that a mining claimant has held a claim for many years in good faith and performed work on the claim is not determinative of the existence of a discovery.

2. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

   The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, stated in Castle v. Womble, 19 L.D. 455 (1894), provides that in order for there to be a discovery, there must be exposed within the limits of the claim minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." That is, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit.

3. Evidence: Burden of Proof--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

   When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to

that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of evidence.

4. Mining Claims: Discovery: Generally

Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit.

APPEARANCES: John Leslie Hamner, Esq., Butte, Montana, for appellants; Christine T. Reck, Esq., Office of the General Counsel, U.S. Department of Agriculture, Missoula, Montana, for contestant United States.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Lester Miller and Arlene M. Miller appeal from a decision of Administrative Law Judge Michael L. Morehouse, issued March 19, 1984, which declared the Montreal Star Nos. 1 and 2 lode mining claims to be invalid because of lack of a discovery of a valuable mineral deposit.

Upon request of the Forest Service, U.S. Department of Agriculture, the Bureau of Land Management (BLM) filed a contest complaint against the Montreal Star Nos. 1 and 2 lode mining claims which had been located by Lester Miller and Arlene M. Miller on October 7, 1980. 1/ Certificates of location for these mining claims were recorded with BLM on November 17, 1980. The complaint alleges that no discovery of a valuable mineral deposit sufficient to support a mining location had been made upon or within the limits of the claims and that the claims were not being held in good faith for mining purposes.

The Government presented its evidence primarily through Norman Day, a Forest Service geologist, who testified that he conducted a mineral examination of the claims for 4 days during the latter part of September 1980. 2/ He was accompanied by two representatives for appellants: Hal Hicks, the grandson of Lee Hicks, the lessee of the claim, and Bud Bye, a miner employed by appellants (Tr. 14). Day made maps of the claims and the various surface and subsurface workings (Exhs. G-4, G-22, G-23, G-24; Tr. 15, 25). It was indicated to Day by appellants' representatives during his examinations that

1/ The subject claims, located in secs. 3 and 4, T. 4 N., R. 7 W., Montana Principal Meridian, were originally located in 1933 and were deeded to the Millers in 1969. In September 1980 the claims were declared abandoned for failure to comply with the provisions of 43 U.S.C. § 1744(a)(2). In October 1980, the claims were relocated by appellants.

2/ This mineral examination appears to have been conducted when the claims had already been deemed abandoned and void. See n.1.

the general area of the discovery point on the Montreal Star #1 was located in veins at the 100 foot level of the shaft located on that claim. He also noted that the area for the discovery for the Montreal Star #2 was indicated by veins that were accessed by the cross-cut adit (Exhs. G-22, G-23; Tr. 27, 29, 33, 60).

Day testified he took three samples from the Montreal Star #1 claim; two samples from mineralized material at the 100 foot level and one sample from a vein at the 80 foot level (Tr. 34-36). Two samples were taken from Montreal Star #2 from veins in the cross-cut adit (Tr. 37). Day stated that the samples were taken from the most mineralized areas still accessible. The samples and the areas from which they were taken were discussed with appellant Lester Miller and no additional samples were requested by him (Tr. 33). Day testified there were no other accessible points, nor were there any surface workings identified as discovery points (Tr. 38).

The samples were assayed and in-place values per ton calculated (Exh. G-25, G-27). Day testified he obtained a smelter schedule for the East Helena smelter, the smelter most likely to be used for material from the claims in question, and calculated net smelter returns for in-place value per ton for each of the samples in question (Tr. 42-44). Since all of the net smelter return figures were minus values greater than $ 100 per ton (Exh. G-27), he did not take into account mining and shipping costs to the smelter which would have increased the smelting losses, based on the values of each sample. However, he noted that even before shipping costs, a negative net smelter return would obviously result because, for every ton of ore shipped, appellants would have to pay between $ 127 to $ 146 instead of receiving any payment themselves (Tr. 44-45).

Therefore, Day testified that based on his examination of the claims it was his opinion that a person of ordinary prudence would not be justified expending his time and money in the development of the mine (Tr. 45-46, 63). In arriving at his conclusion Day noted he had taken into account previous mineral examinations by a Mr. Woodward in 1939 and a Mr. Schessler in 1959. Although both examinations showed higher values, Day testified that he felt the Woodward samples were not representative since they were grab samples and were not taken from in-place mineralization (Tr. 48). He thought the Schessler sample was not representative of realistic mining expectations since it was only 25 inches in length and probably came from a high grade material that had since been removed (Tr. 50).

Day also testified he never saw any on-going mining activities or exploration at the claim sites (Tr. 51). Mr. Forest Morin, resources assistant for the Forest Service, confirmed Day's observation, testifying that during his six visits to the claims in 1979, 1980, 1981, and 1983, he, too, had never seen any mining activity taking place (Tr. 71-72).

Appellant Arlene Miller testified that she and her husband were owners of the Montreal Star Nos. 1 and 2 claims and that prior to 1980 the claims had been leased for some years to Lee and Bill Hicks (Tr. 75-76). She stated ore was shipped from the mine to the East Helena smelter in October 1975, and an operating profit was realized from that shipment (Tr. 77). Mrs. Miller was

not clear as to the exact amount of profit received (Tr. 81). However, she admitted that since that time the property has not been actively mined and she and her husband were hoping that some big company might provide investment capital (Tr. 79). She thought the 1975 shipment was taken from below the 100 foot level of the shaft on the Montreal Star #1 (Tr. 80). When asked about production feasibility and the need for further exploration, she admitted she was not sure, but thought further exploration was needed (Tr. 81).

Bud Bye, who accompanied Day when he examined the claims, testified for appellants. He first became acquainted with the claims in 1977, and stated that both he and Lee Hicks had prospected on the claims. He had also helped one Fred Kircher take some samples from the claims. Bye felt there was sufficient mineralization to justify operating the mine (Tr. 86).

Jasper Dawson, a tool sharpener, testified as to his involvement with appellants' sampling methods. He indicated he had spent a lot of his time and money providing services and paying for assays of samples taken from the mine (Tr. 88). He testified he was not sure exactly who took the samples that he had assayed, but that it was probably either Bud Bye or Bill or Lee Hicks (Tr. 89-90). These samples were presented to him approximately 4 months before Lee Hicks died in December of 1980 or 1981 (Tr. 91). He testified that Bill Hicks also took some samples with a geologist by the name of Kircher and some of these samples were delivered to him and he had them assayed (Tr. 93). He apparently split the samples that were given to him and had a Salt Lake assay office analyze one of the portions and either Kircher or some other assay office analyze other portions (Tr. 93, 98-101). He sent portions of approximately 15 samples to the Rogers Research and Analysis Laboratory in East Bountiful, Utah, for assay and received a report from them (Exh. C-14; Tr. 94). He was not present when any of the samples were taken (Tr. 95, 103).

Bill Hicks testified as to his involvement with work at the claims. He stated that his father started mining on the claims in 1938. He testified that he was with Kircher when he took the samples described by Dawson (Tr. 107, 110). He helped mine the ore that was shipped in 1975 (Tr. 113). He stated that it took about 2 weeks to mine approximately 40 tons (Tr. 120). This ore was taken from a vein in the cross adit on the Montreal Star #2 and was intended as a trial shipment to see if it would pay. He stated that he recalled they just broke even on it and so it was decided that no more would be shipped (Tr. 121). He also admitted they were no longer able to do "much of anything" on the claims except for a little clean-up work (Tr. 128). He indicated further prospecting would only be worthwhile if the right processes were adopted to make it profitable (Tr. 129).

Ted Morse, a "ceramic engineer scientist" employed by Montana Energy Research and Development Institute in Butte, Montana, testified he was familiar with the claims. He stated that he ran some chemical assays on samples from the claims and found lead, bismuth, copper, silver, nickel, gold, zinc, strontium, talc, iron, and sulphur (Tr. 136). However, he noted that his assays were not performed in such a way as to enable him to form any opinion as to the quantity of these minerals in the samples (Tr. 136). He said he had been on the claims several times with Lee Hicks. When asked whether a

reasonably prudent person would be justified in pursuing prospecting or developing the mines, he stated that he would be "tempted" (Tr. 137). On cross-examination, he stated that the claims warranted more prospecting and exploration, prior to production (Tr. 138-39).

On appeal, appellants claim that the preponderance of evidence shows a discovery of valuable mineral deposits "sufficient to support valid location of the claims" and that the Administrative Law Judge applied a rule more stringent than the prudent man rule. Appellants also argue that their "property right based on a valid discovery continues as long as assessment work is pursued and good faith is maintained." 3/ Appellants note that with respect to allegations in the contest complaint that the mining claims were not being held in good faith for mining purposes, the Administrative Law Judge held that the Government failed to present a prima facie case and the allegation was dismissed (Decision at 7). Therefore, they postulate that without a discovery there could not have been a good faith relocation and that the good faith issue depends on a "valid discovery."

In reply to the statement of reasons, counsel for the United States asserts the Government established a prima facie case of lack of discovery; appellants failed to overcome the Government's prima facie case by a preponderance of the evidence; and the finding that the Government failed to present a prima facie case regarding the charge of lack of good faith does not prohibit a finding of lack of discovery.

[1] We must reject appellants' contentions. Whether the subject claims were being held in good faith in not determinative of the existence of a discovery. It is not unusual for the record of a mining contest to justify a finding of no discovery where there is not sufficient evidence to support a finding of a lack of good faith on the part of the claimants. United States v. Prowell, 52 IBLA 256 (1981); see also United States v. Dillman, 36 IBLA 358 (1978). While we find no basis for disagreeing with the Administrative Law Judge's finding that appellants were holding the claims in good faith for mining purposes, this does not require a finding that a discovery has been made.

[2] The basic test for determining whether a mining claimant has discovered a valuable mineral deposit on his mining claim is the "prudent man rule." This rule, enunciated in Castle v. Womble, 19 L.D. 455 (1894), states that in order for there to be a discovery, there must be exposed within the limits of the claim minerals of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The "prudent man rule" is complemented by the "marketability test." Simply stated, in order to establish the existence of a valuable mineral deposit, it must be shown that the mineral can be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968).

3/ Another argument posed by appellants is that Judge Morehouse "apparently applied a rule requiring claimant to prove existence of known reserves" (Notice of Appeal at 1). Judge Morehouse made no such ruling.

[3] It is well-settled that when the Government contests the validity of a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral deposit. Foster v. Seaton, supra; United States v. Jones, 72 IBLA 52 (1983).

Here, the Government more than adequately established its prima facie case at the hearing through the testimony of Day which clearly showed the uneconomical nature of the Miller's mineral deposit. His testimony and the documentary evidence established low mineral values at best.

Appellants failed to overcome this prima facie showing by their own presentation at the hearing. The reliability of appellants' sampling is questionable because of the uncertainty of where and how their samples were taken and how the assays were conducted. Appellants made no showing that there was a reasonable possibility that their claims could be mined at a profit.

[4] At most, appellants' evidence merely showed that further exploration might be justified on these claims. Evidence of mineralization which may justify further exploration, but not development of a mine, does not establish a discovery of a valuable mineral deposit. United States v. Weekley, 86 IBLA 1 (1985); United States v. Arbo, 70 IBLA 244 (1983); United States v. Jones, supra. From our review of the record, we conclude there is not sufficient evidence of mineralization within either of these two lode claims to warrant a prudent man to expend money and time with reasonable expectation that a profitable mining operation could be developed. Castle v. Womble, supra. The facts of record fail to show that the minerals on these claims can be extracted, removed, and marketed at a profit. United States v. Coleman, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING:

Appellants' statement of reasons incorporates by reference the trial memorandum filed with the Administrative Law Judge. In the memorandum they argue that they adopted the original discoveries made on the two claims in 1933 by Louis Gagnier when they relocated the claims in 1980 and the production obtained by Bill and Lee Hicks from the Montreal Star claim (now the Montreal Star #2) in 1940 indicates the validity of the discovery. 1/ Unless the Government shows that the land is nonmineral in character because of "exhaustive" mining, appellants then argue, the claims continue as long as assessment work is performed and good faith is maintained.

There must be a valid discovery at the time of a contest hearing. United States v. Alaska Limestone Corp., 66 IBLA 316 (1982). "The present and prospective value of any mine consists in what is in the earth, not in what has been taken from it." United States v. Nicholson, 31 IBLA 224, 233 (1977). Although there may have been a valuable mineral deposit in 1933 or 1940, it is clear that appellants have not overcome the evidence that there was no discovery on the relocated claims at the time of the hearing. If the claims are worked out, annual assessment work (or notice of intent to hold the claims) and good faith efforts to find a mineral deposit on the claims are not sufficient for the contestee to prevail. See United States v. Logomarcini, 60 I.D. 371 (1949).

Will A. Irwin
Administrative Judge

1/ The memorandum apparently confuses the two claims, now named the Montreal Star #1 and #2, when it claims that Montana Bureau of Mines and Geology Bulletin No. 16 reports a valid discovery on Montreal Star #1 (formerly the Golden Gate). That publication is earlier referred to in the memorandum as the source of the report of production in 1940 on the Montreal Star claim, now the Montreal Star #2.